United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-2128

To be argued by
DANIEL J. STEINBOCK

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IMAMUN ABDUT TAWWAB (a/k/a Eric Caesar), MASSIR ABDUL SABUR (a/k/a Irving Dunaway), DAMUD ABDULLAH RAHMAN, TARIQ ABDUR RAHMAN (a/k/a Graham Johnson), ABBAS ABDUL RAQIB (a/k/a Robert Young), KASIM ABDUL JABBAR (a/k/a Herschel Lee Armour), SALAH ABDUR RAHMAN (Levon Jackson), ABDUL BASIR AL JABBAR (a/k/a Lester R. Tepway),

Appellants,

- against -

PAUL W. METZ, Individually and as Superintnedent of Great Meadow Correctional Facility, and BENJAMIN WARD, Individually and as Commissioner of the New York State Department of Correctional Services, MARSHALL MASON, Individually and as Correctional Sergeant, Great Meadow Correctional Facility,

Appellees.

DOCKET NUMBER
76-2128

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

This brief is respectfully submitted in reply to the Brief for Defendants-Appellees.

ARGUMENT

POINT I

THE REFUSAL OF PRISON OFFICIALS TO ALLOW ALL SUNNI MUSLIMS TO RECEIVE RELIGIOUS INSTRUCTION FROM OUTSIDE MINISTERS VIOLATES THEIR RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

The Sunni Muslim plaintiffs challenge a policy of Great Meadow Correctional Facility which seriously diminishes their ability to freely exercise their religious beliefs. This policy deprives them in large part of the religious instruction which is an essential part of their faith. The defendant prison officials do not dispute that every Sunni Muslim inmate retains the right to access to spiritual instruction by his leaders, nor that the prison's policy restricts the inmates' religious freedom. Rather, they assert that the particular restriction imposed on plaintiffs' religious exercise is "reasonable" in light of the institution's objectives of "the maintenance of security and the orderly operation of the facility...."*

The "reasonableness" of defendants' policy is not at issue on this appeal; the sole issue is whether a cognizable

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* Brief for Defendants-Appellees, p. 11.

claim for relief has been stated by plaintiffs.* If defendants seek to justify their admittedly restrictive policy, they must make a factual showing that the policy has an important objective and is the least restrictive necessary to achieving that objective.** Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976). This kind of factual showing can only be made at an evidentiary hearing in the district court.

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* In a footnote to their brief, defendants state that "only the three plaintiffs who met with the outside ministers... are named in the first cause of action" and that the complaint fails to allege that "any other plaintiff was denied the opportunity to meet with the outside ministers." Brief for Defendants-Appellees, p. 10. In fact, all eight plaintiffs are named in this cause of action. Appendix, p. A2. The complaint further alleges that, with the exception of plaintiffs Imannun Abdut Tawwab, Nassir Abdul Sabur, and Dawud Abdullah Rahman, no Sunni Muslims were permitted to meet with the ministers. Appendix. p. A6. Clearly, the remaining five plaintiffs were deprived of the opportunity of meeting with the visiting clergy.

** Defendants characterize this policy, which deprives most Sunni Muslims of contact with clergy for religious instruction, as a "detail" of prison management, citing Kahane v. Carlson, 527 F.2d 492, 496 (2d Cir. 1975), for the proposition that the specific means of enforcing an established right may be left to the prison's discretion. In Kahane, this Court upheld the district court's finding that the prisoner had a right to kosher food under the Free Exercise Clause. It used the cited language only to reject the district court's direction that one particular method of supplying the food--hot kosher "TV" dinners--be employed. Here, plaintiffs seek precisely the kind of declaration of religious right which was upheld in Kahane. Certainly, such true "details" as the time, place, and reasonable notice of the Sunni Muslims' meetings can be left to the discretion of the prison officials.

The very contentions raised by defendants in their brief highlight the need for the development of a record on plaintiffs' claim. In citing "reasonableness", "security", and the potential "burdens on this penal institution" in order to justify their policy, defendants are presenting factual allegations controverting the allegations of the complaint. Plaintiffs contend that these interests do not justify the restriction at issue, and have alleged that, in fact, no significant burden or threat to security results from collective religious instruction.* This kind of factual dispute can only be resolved at trial. In other situations almost identical to the one at bar, this Court has remanded inmates' claims of interference with religious rights for evidentiary hearings in the district courts on the state's purported justifications for the limitations on those rights. Burgin v. Henderson, supra; Mawhinney v. Henderson, 542 F.2d 1 (2d Cir. 1976); Mukmuk v. Commissioner of Department of Correctional Services, 529 F.2d 272 (2d Cir.

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* In this context, it is noteworthy that prior to the establishment of the policy, the entire Sunni Muslim community was permitted to receive collective instruction; it is thus far undisputed that these gatherings took place without incident or actual threat to institutional security. Complaint ¶23, Appendix p. A5.

1976) cert. denied, U.S. , 96 S. Ct. 2238 (1976).*

The defendants incorrectly state that plaintiffs base their claim for relief in part on a "right of free association."** They suggest that meetings with religious ministers "constitute communications with outside persons just as prison visits by other persons would,"*** and cite Pell v. Procunier, 417 U.S. 817 (1974), for the proposition that prison officials may limit face-to-face communication.

Plaintiffs' cause of action is based solely on the provisions of the First Amendment involving religious freedom; interference with a right to associate with the general public is simply not one of their claims. In Pell, the Supreme Court upheld a prison regulation which limited the access of inmates to members of the general public (in that instance, the press) in the light of the alternative means of communication with the public which were available.

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* LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972), cert. denied, 414 U.S. 878 (1973), relied on by defendants is entirely consistent with these cases. The determination that the restriction on religious expression was reasonable was made by the district court, and affirmed by this Court, only after a full evidentiary hearing.

** Brief for Defendant-Appellees, p. 10.

*** Id. at 11.

No claim of interference with religious rights was raised.* It is clear that inmates' right of access to religious counsel is entirely different in nature from the right to personal contact with "members of the general public" with which Pell was concerned. This Court has long recognized that a prisoner's assertion of the right of religious freedom "falls in quite a different category" from other problems of prison management. Pierce v. LaVallee, 293 F.2d 233, 235 (2d Cir. 1961).

Plaintiffs have stated a claim upon which relief can be granted. In seeking to justify the district court's dismissal of that claim, defendants have merely offered explanations, which are not part of the record before this Court, to justify their restrictions on plaintiffs' rights. The matter must therefore be remanded to the district court for inquiry into whether those explanations can meet the government's burden in justifying these serious limitations on the plaintiffs' religious freedom.

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* Ironically, one of the alternative means of communication cited by the Supreme Court in Pell was communication through personal contact with the clergy. 417 U.S. 817 passim.

POINT II

THE REFUSAL OF PRISON OFFICIALS TO ALLOW MORE THAN ONE INMATE IN SPECIAL HOUSING AT A TIME TO RECEIVE A LEGAL VISIT VIOLATES THE INMATES' RIGHT OF ACCESS TO THE COURTS.

As stated in the complaint, and confirmed by defendants' counsel in the district court, Great Meadow Correctional Facility has a rule that at any one time no more than one inmate from F-Block (the special housing unit) may receive a legal visit. This policy constitutes a serious restriction on plaintiffs' right of access to counsel guaranteed by the Fourteenth Amendment.

Defendants' response to these claims is to characterize the effect of their policy as a "minor inconvenience to counsel on a single occasion"* and to raise, for the first time, factual allegations that plaintiffs have failed to pursue available administrative solutions. Neither of these contentions is accurate.

Plaintiffs' claim for damages and injunctive relief addresses not a "single occasion", but a standing policy of Great Meadow Correctional Facility to limit the number of inmates in F-Block who can receive counsel visits at any one time. The existence of this policy is admitted in the

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* Brief for Defendants-Appellees at p. 18.

affidavit of Assistant Attorney General Timothy F. O'Brien filed in support of defendants' motion to dismiss.* As a result of this policy, on December 30, 1975, two plaintiffs were refused the opportunity to meet with their attorney to review and revise the draft of the other claims for relief in this action. Having thus been harmed by this policy, plaintiffs have standing to challenge its continuation.

Furthermore, it is not "a minor inconvenience to counsel" of which plaintiffs complain, but a substantial interference with their own right of access to attorneys, and through them, to the courts. As is explained at length in the Brief for Appellants, pp. 15-17, the denial of a meeting between counsel and client constitutes a serious infringement of plaintiffs' right of access to counsel--one at least as great as that held unconstitutional in Procunier v. Martinez, 416 U.S. 396, 419-23 (1974). Defendants' policy "obstructs the availability of professional representation," Procunier v. Martinez, supra, 416 U.S. at 419, and is invalid unless defendants plead and prove at an evidentiary hearing that the restriction of

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* The affidavit states in pertinent part: "It is...patent from the complaint itself that such denial [of the right to visit with an attorney] was made pursuant to a reasonable rule then in effect at Great Meadow Correctional Facility, which was explained to counsel at the time, i.e., 'The visiting room officer informed counsel that these plaintiffs incarcerated in the Special Housing, F-Block,

(continued)

access to counsel is justified by a legitimate interest of penal administration and is the least restrictive means necessary to satisfy that interest. Id. at 420. Shakur v. Malcolm, 525 F.2d 1144, 1148, n. 3 (2d Cir. 1975).

Defendants cite no legal authority to support their restrictive policy. Rather, they resort to bald assertions that "[p]laintiffs' visiting counsel...could have avoided the incident by contacting the prison administration in advance of their visit to F-Block to make arrangements to conduct several interviews at the same time,"* and that "[t]his is yet another example of a simple problem which could easily have been resolved administratively... but which has instead been transformed into a basis for unnecessary litigation."** These statements are, of course, totally unsupported by the record and should therefore be disregarded.***

(continued)

could not visit in the visiting room while another inmate from F-Block was having a legal visit ***'" Affidavit of Assistant Attorney General Timothy F. O'Brien, #15, Appendix p. A27.

* Brief for Defendants-Appellees at p. 19.

** Id. at p. 20.

*** They are also wholly inaccurate. In actuality, since April, 1975, plaintiffs' counsel have asked officials of the New York State Department of Correctional Services for a change in the policy at issue, and have been repeatedly rebuffed. Plaintiffs are prepared to demonstrate these efforts at an evidentiary (continued)

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT DISMISSING THE FIRST AND FIFTH CAUSES OF ACTION SHOULD BE VACATED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS.

Respectfully submitted,

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(continued)

hearing in the district court. If this litigation is "unnecessary" it is only because of defendants' own refusal to resolve the problem administratively despite numerous requests to do so.